United Nations AT/DEC/1111

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1111

Case No. 1210: MILLER

Against: The Secretary-General of the International Civil Aviation Organization

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Mayer Gabay, Vice-President, presiding; Mr. Omer Yousif Bireedo; Mr. Spyridon Flogaitis;

Whereas, on 13 May 1992, Bernard Miller, a staff member of the International Civil Aviation Organization (hereinafter referred to as ICAO), filed an Application against the decisions to issue a reprimand to be placed in his personnel file on 6 December 1990, and to withhold his annual increment, due on 2 January 1991;

Whereas on 12 November 1993, the Tribunal rendered Judgement No. 623, *Miller*. The Tribunal considered that "the action taken by the Director of the Bureau of Administration and Services in issuing a written reprimand was in full compliance with the authority vested in him" and that in the decision to withhold the annual salary increment, was "taken after careful consideration" and constituted "a valid exercise of the Secretary General's discretionary authority in the matter, in conformity with the applicable procedures". At the same time, the Tribunal could not overlook the fact that the Applicant was not informed of the withholding of the increment until nine months after it had been implemented and had no opportunity to make representations or seek redress through regular

channels. This, in the Tribunal's view, amounted to a procedural irregularity for which the Applicant was entitled to a monetary compensation of US$1,500.00.

Whereas at the request of the Applicant, the President of the Tribunal, with the agreement of the Respondent, extended to 30 June 1995 the time limit for the filing of a new application with the Tribunal;

Whereas, on 30 June 2001, the Applicant filed an Application containing pleas which read as follows:

"II. PLEAS

9. With regard to competence and procedure, the Applicant respectfully requests the Administrative Tribunal:

...

(b) *to find* that the present application is receivable under article 7 of its Statute;

(c) *to find that* ... the Applicant has effectively exhausted all his internal recourses ...

(d) *to determine* that ... it will hold oral proceedings ...

(e) *to determine* that it will hear witnesses and call for the production of documents.

...

(m) On the human rights merits ... *to find*;

...

(n) On the administrative merits ... *to find*;

ADMINISTRATIVE PLEAS

Pleas on Jurisdiction and Competence

...

ADMINISTRATIVE PLEAS ON THE SUBSTANCE

...

The Applicant requests the Tribunal to order that he be immediately reinstated with full back pay and restoration of benefits plus compensation ... and payment of all medical and administrative costs incurred. ... If the Respondent chooses not to reinstate the Applicant, he should pay by way of compensation ... five years' net base salary, plus all costs incurred by [the] Applicant to date as a result of his termination.

...

[The] Applicant requests the Tribunal to order ICAO to pay him [additionally thirty] years' net base salary [as compensation for various wrongs committed].

..."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 19 October 2001 and once thereafter until 9 November 2001;

Whereas the Respondent filed his Answer on 30 October 2001;

Whereas the Applicant filed Written Observations on 2 December 2001;

Whereas, on 25 April 2002, the Respondent submitted comments on the Applicant's Written Observations, and on 11 June 2002, the Applicant responded thereto;

Whereas on 12 June 2002, the Applicant submitted an additional document;

Whereas, on 26 September 2002, the Respondent submitted additional comments on the Applicant's submission of 11 June, and on 8 November, the Applicant made observations thereon;

Whereas, on 20 February 2003, the Respondent submitted additional comments on the Applicant's observations of 8 November 2002;

Whereas, on 14 and 22 April, 13 May and on 22 and 23 June 2003, the Applicant submitted further documentation;

Whereas, on 10 July 2003, the Tribunal decided not to hold oral proceedings in the case;

Whereas the facts in the case additional to those contained in Judgement No. 623 are as follows:

By memorandum dated 30 January 1994, the Applicant informed the Respondent that as of that date, he was unable to do any further work on the ICAO premises unless changes were made "to make the building safe for me, or medical assistance is provided by ICAO so that I do not become ill within the building". The Applicant did not report to work or present a medical certificate to justify his absence. Subsequently, on 7 February 1994, the Respondent terminated the Applicant's appointment with three months' notice, in accordance with ICAO staff regulation 9.5 (termination by reason of illness), effective 8 May 1994.

The Applicant appealed the decision to terminate his appointment to the Advisory Joint Appeals Board (AJAB), which delivered Opinion No. 106 on 14 November 1994. The AJAB concluded that the Secretary General had acted within the relevant Staff Regulations and Rules in terminating the Appellant's contract, that he had not improperly exercised his discretionary powers in so terminating the Appellant's employment, and that, therefore, the appeal failed. It made the following recommendations:

> "288. The Board recommends that the Organization should be prepared to state in response to any future query as to the reasons for the termination of the Appellant's employment that the termination was because he was reacting adversely to the environment in the ICAO building to the extent that he could no longer work there.
>
> 289. The Board recommends that, if termination of contracts under the provisions of Staff Regulation 9.5 are being considered in the future, action should not be taken until specific documented medical advice has been obtained. It is further recommended that termination action should not be taken until the Organization has assisted the staff member in pursuing all reasonable means of alleviating the staff member's condition.
>
> ..."
>
> On 9 December 1994, the Secretary-General, advised the Applicant as follows:
>
> "...
>
> I accept the conclusions and recommendations of the Board ... and note the recommendations in paragraph 289. However, I am unable to accept the Board's recommendation in paragraph 288."

On 8 November 1995, the Applicant was informed that the United Nations Joint Staff Pension Board (UNJSPB) "confirmed and noted the unanimous decision and recommendation of the ICAO Staff Pension Committee that you do not qualify for a disability benefit under the terms of Article 33(a) of the Regulations and Rules of the [United Nations Joint Staff Pension Fund (UNJSPF). He was further advised that he could request a review of the decision of the ICAO Staff Pension Committee (SPC), which he did. Following the establishment of a Medical Board, the SPC concluded its review in August 1998 and confirmed its earlier decision not to award the Applicant a disability benefit. The Applicant did not appeal this decision to the Standing Committee of the UNJSPB.

On 30 April 1997, following the Applicant's request for compensation under ICAO staff rule 106.5, the Applicant underwent a medical examination by an

outside doctor, as stipulated by the ICAO Advisory Board for Compensation Claims (ABCC). As he was found neither ill nor disabled, the ABCC recommended that no compensation be paid. The Respondent accepted the recommendation and, on 26 June 1997, the Applicant was advised accordingly.

By letter dated 21 July 1997, the Applicant requested the Respondent to review his decision in accordance with ICAO staff rule 106. Another Medical Board was established in accordance with staff rule 106.17 (a), and it submitted a report on 19 May 1998 and further clarification on 29 October 1999. The ABCC concluded its consideration of this matter at its Forty-ninth meeting held on 7 March 2000, and recommended that the Applicant be paid "the salary and allowances which [he] was receiving at the date on which he last attended duty until the expiry of one calendar year from the first day of absence resulting from the illness". On 8 September 2000, the Applicant was informed that the Respondent "had approved, payment of compensation of one year's salary in accordance with Staff Rule 106.5."

On 17 May 2001, the Applicant lodged an appeal with the AJAB on this decision and on "various other matters", however, on 11 July 2001, the Chairman of the AJAB advised him that the Board found that it had no jurisdiction to consider his appeal, since he was "not a staff member of ICAO as indicated in ICAO staff rule 111.1.6."

On 30 June 2001, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Applicant contends that the Tribunal erred in choosing not to consider and rule on aspects of his pleas in Judgement No. 623, and therefore, requests permission to resubmit those pleas for its reconsideration as an integral part of this appeal.

2. The deliberate actions of ICAO against him, both before and since his dismissal on health grounds, constitute violations of his human rights under the Universal Declaration of Human Rights.

3. The Applicant contends that he is unable to formulate his pleas on the merits fully until he has received the additional documents requested and the requested witnesses have been heard.

4. The Applicant contends that ICAO's actions have made it impossible for him to meet all required deadlines.

Whereas the Respondent's principal contentions are:

1. As neither the rules of ICAO nor those of the UNJSPF permit direct appeal to the UNAT from decisions of the SPC which have not been appealed to the Standing Committee of the Board of the UNJSPF, the Respondent submits that the application to the UNAT in respect of all matters relating to and leading up to and relating to the SPC decision is not receivable.

2. The Respondent does not agree with the decision of the AJAB that it had no jurisdiction to consider the appeal. Therefore, the Respondent requests the Tribunal to remand to the AJAB for appropriate consideration that part of the Application which deals with the proceedings before the ABCC and the Respondent's decision of 8 September 2001.

3. The Respondent submits that the human rights' pleas of the Applicant are not receivable.

4. The matters raised in Judgement No. 623 are *res judicata*.

5. Any other matters falling within the numerous pleas lodged by the Applicant, which have not first been lodged by the Applicant with the AJAB for appropriate consideration, are therefore not receivable.

The Tribunal, having deliberated from 1 to 23 July 2003, now pronounces the following Judgement:

I. The Applicant has submitted three main claims to the Tribunal: the first concerns the termination of the Applicant's appointment, in accordance with ICAO staff regulation 9.5, effective 8 May 1994; the second deals with the 8 November 1995 decision of the UNJSPB to deny the Applicant a disability benefit under the terms of Article 33(a) of the Regulations and the Rules of the UNJSPF; and, the third is against the decision from the ICAO AJAB, communicated to the Applicant in a letter dated 11 July 2001 by the Chairman, that it had no

jurisdiction to consider his appeal, "since you are not a staff member of ICAO as indicated in ICAO staff rule 111.1.6". The appeal to the AJAB was made against the 11 September 2000 decision of the Respondent to accept the ABCC's recommendation to pay the Applicant a compensation of one year salary, in accordance with ICAO staff rule 106.5.

II. The Tribunal will consider each of these claims separately. It notes that the Respondent raises issues of receivability, both for failure to respect the time limits and to follow the required procedures. As such issues of receivability are in the public interest they must be strictly adhered to, in particular deadlines. It is not possible to bring claims after the expiration of the deadline. This applies to the present case, where the Applicant, who is contesting the decision taken on the compensation issue under ICAO staff rule 106.5, tries to revive the two earlier claims, which are time-barred.

The first claim, against the decision to terminate his appointment, dated 7 February 1994, is time-barred. The Applicant filed an appeal against this decision to the AJAB, which rendered its Opinion on 14 November 1994. He did not appeal the Respondent's decision on this Opinion to the Tribunal at the time, although he was granted a deadline until 30 June 1995: he made no formal request to the Tribunal until December 2000, more than five years later, in connection with other issues.

The second claim, dealing with the request for a disability benefit is also inadmissible. First, because the Applicant failed to bring the claim in a timely manner, and also because he did not follow the required procedure of first appealing to the Standing Committee of the UNJSPF. The Tribunal notes that the Applicant was advised that he could request a review of the ICAO SPC's decision and was provided with procedural guidance to that effect. However, the Rules of both ICAO and UNJSPF do not allow appeal to the Tribunal against decisions of the SPC which have not first been appealed to the Standing Committee of the Board of the UNJSPF. This never took place.

III. The Tribunal now turns its attention to the third claim, which obviously is not time-barred or irreceivable on other grounds.

The Applicant initiated, on 14 May 1994, the procedure of obtaining compensation under ICAO Staff Rule 106.5. He underwent medical examinations and finally, on 7 March 2000, the ABCC concluded that in accordance with staff rule 106.5, paragraph 11.1 (b) (ii), the Applicant should be paid the salary and allowances which he was receiving at the date on which he last attended duty until the expiry of one calendar year from the first day of absence resulting from the illness. The ABCC's recommendation was approved by the Respondent on 8 September 2000.

At that time, the Applicant followed two parallel procedures: he appealed to both the Tribunal and the AJAB, against the decision made by ABCC. In his opinion, the matter could be directly submitted to the Tribunal, following precedent found in Judgement No. 435, *Goodchild* (1988). However, ICAO rules require prior submission to the AJAB. Nevertheless, the AJAB, informed him on 11 July 2001 that, "after careful consideration to his averments", it found that it had no jurisdiction, since the Applicant was not a staff member of ICAO, "as indicated in ICAO staff rule 111.16".

The Tribunal holds that the AJAB erred in its decision that it had no jurisdiction over the matter. It notes that the Respondent has stated in this regard that he

> "regrettably cannot agree to the decision of the AJAB. It can lead to unconscionable results. Ex-staff members of ICAO have the right, and have had the right, to appeal any matter falling within staff regulation 11.1, in the same manner as current staff members, so long as the cause of action arises as a result of their employment with the organization."

Thus, by so doing, the AJAB did not observe the Applicant's due process rights, for which he deserves to be compensated.

Under the circumstances of the present case, the Tribunal believes that it would serve no purpose to remand the case to the AJAB, as the ABCC already has given the Applicant the maximum amount of compensation allowed under the relevant ICAO Rule, and such a decision to remand would lead to a denial of justice. Thus, the only issue that remains to be resolved is the amount of compensation to be awarded.

IV. The Tribunal will finally deal with the Applicant's attempt to reopen issues raised in his earlier Application in 1992, resulting in Judgement No. 623. According to the Applicant, several of the pleas contained in that Application were not examined by the Tribunal, and thus he requests the Tribunal's permission to resubmit those pleas for its reconsideration as an integral part of his current submission. The Tribunal notes that it had considered these pleas in Judgement No. 623 and had decided to reject them. Thus, these pleas are considered to be *res judicata*, and, therefore, are not subject to further appeal.

V. On the basis of the above the Tribunal:

1. Orders the Respondent to pay the Applicant three months net base salary, at the rate in effect at the time of his separation from service, as compensation for the lack of due process; and,

2. Rejects all other pleas.

(Signatures)

Mayer **Gabay**
Vice-President, presiding

Omer Yousif **Bireedo**
Member

Spyridon **Flogaitis**
Member

Geneva, 23 July 2003

Maritza **Struyvenberg**
Executive Secretary

MILLER